Re Azhar Azizan Harun (as the absolute representative of Eleanor Dulcie Robinson)

HIGH COURT (KUALA LUMPUR) — PETITION NO S2–32–123 OF 1998
KAMALANATHAN RATNAM J
4 DECEMBER 1998

Succession *— Probate — Limited grant — Application for limited grant by attorney — Not relevant to a petition for resealing — Executrix able to administer estate of deceased in Malaysia using grant issued in United Kingdom — Whether High Court needed to issue her a grant*

Succession *— Probate — Resealing of grant — Petitioner given power of attorney by executrix — Petition filed in name of petitioner — Deputy registrar held petition not filed correctly — Whether petitioner must commence petition in executrix's name*

The petitioner was granted a power of attorney ('the PA') by one Eleanor Dulcie Robinson, allowing him to file a petition for resealing a grant of probate pursuant to s 52 of the Probate and Administration Act 1959 ('the Act'). A petition was filed in the name of 'Azhar Azizan Harun sebagai wakil sah Eleanor Dulcie Robinson'. The deputy registrar ('the DR') was not convinced that the petition had been filed correctly, in that it should have been filed in the name of Eleanor Dulcie Robinson as the petitioner, as there was no substantive provision in the Act or the Rules of the High Court 1980 ('the RHC') allowing a petition being filed in the manner that was done.

The petitioner submitted that prior to the coming into effect of the RHC, the practice in courts relating to probate and administration was governed by the Probate and Administration Rules 1961 ('the 1961 Rules'), which was later repealed by the RHC. In view of the absence of specific provision relating to an application for resealing in the RHC, counsel argued that the procedure in Malaysian courts relating to the same should be as nearly like as they can be to analogous proceedings before the RHC, meaning the application could now be made by way of a petition and naming an attorney as the petitioner. The DR disagreed and was of the view that if the provisions of the repealed Probate and Administration Rules 1961 is not incorporated in the RHC, it cannot continue to apply and that the procedure in England cannot apply in Malaysia due to the absence of r 39 of the Non-Contentious Probate Rules 1987. The DR gave the petitioner opportunity to amend the petition but the petitioner requested that the petition be dismissed in order for him to appeal to the judge.

Held, setting aside the order and ordering that an amended petition be filed within 14 days from the date of decision:

(1) As the rules of procedure were silent, the DR tried to give effect to the provisions of s 52 of the Act by not relying on the repealed 1961 Rules but by following general legal principles. Until and

unless the rules committee reinstates the provision giving the right to the power of attorney to make the application on his behalf, the petitioner must commence the petition in the executrix's name. The petitioner is therefore allowed to amend the petition, in accordance with powers granted to the court under O18 r 19 of the RHC (see p 98G–I).

(2) Order 71 r 26 of the RHC is concerned with the issuance of a limited grant to the attorney as an administrator. It is not relevant to a petition for resealing. As clearly stated in s 52 of the Act, when the grant of probate is resealed in this case, the executrix would be able to administer the estate of the deceased in Malaysia by using the same grant that was issued to her by the High Court in the United Kingdom. The High Court here does not need to issue her a grant (see p 98D–E).

(3) The petitioner may affirm the affidavit verifying the petition on behalf of the executrix as the power of attorney is wide enough to authorize the attorney to sign the affidavit on the executrix's behalf. The statements in the petition may be verified by official documents and therefore do not require the personal skill and knowledge of the attorney (see p 100E–F).

[Bahasa Malaysia summary

Pempetisyen diberi surat kuasa wakil ('surat kuasa wakil tersebut') oleh Eleanor Dulcie Robinson, membenarkannya untuk memfailkan petisyen untuk memeterai semula geran probet selaras dengan s 52 Akta Probet dan Pentadbiran 1959 ('Akta tersebut'). Satu petisyen telah difailkan atas nama 'Azhar Azizan Harun sebagai wakil sah Eleanor Dulcie Robinson'. Timbalan Pendaftar ('TP') tidak yakin bahawa petisyen tersebut telah difailkan dengan betul, dalam mana ia sepatutnya difailkan atas nama Eleanor Dulcie Robinson sebagai pempetisyen, apatah lagi tiada undang-undang substantif dalam Akta tersebut atau Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang membenarkan petisyen difailkan seperti yang dilakukan di atas.

Pempetisyen mengemukakan bahawa sebelum berkuatkuasanya KMT, amalan mahkamah berkaitan dengan probet dan pentadbiran adalah dikuasai oleh Kaedah-kaedah Probet dan Pentadbiran 1961, yang mana kemudiannya telah dimansuhkan oleh KMT. Memandangkan tiada peruntukkan khusus di dalam KMT berkaitan dengan permohonan untuk membuka meterai probet, peguam berhujah bahawa prosedur dalam mahkamah di Malaysia berkaitan kepada perkara yang sama sepatutnya menyamai sedekat yang mungkin prosiding analogi sebelum KMT, yang bermakna permohonan boleh dibuat melalui satu petisyen dan menamakan peguam sebagai pempetisyen. Timbalan Pendaftar tidak bersetuju dan berpendapat bahawa sekiranya peruntukkan pemansuhan Kaedah-kaedah Probet dan Pentadbiran 1961 tidak dimasukkan ke dalam KMT, ia tidak boleh digunapakai dan prosedur di England

A tidak boleh dipakai di Malaysia akibat ketiadaan k 39 Kaedah-kaedah Probet Ketidakbolehbalahan 1987 (Non-Contentious Probate Rules 1987). Timbalan Pendaftar memberi peluang kepada pempetisyen meminda petisyen tetapi pempetisyen meminta petisyen tersebut ditolak supaya beliau boleh membuat rayuan kepada hakim.

B

Diptutuskan, mengenepikan perintah dan memerintahkan pindaan petisyen difailkan dalam tempoh 14 hari dari tarikh keputusan dibuat:

(1) Oleh kerana kaedah-kaedah prosedur tidak menyatakan apa-apa, Timbalan Pendaftar telah cuba untuk memberikan kesan kepada
C s 52 Akta tersebut dengan tidak bergantung ke atas Kaedah 1961 yang telah dimansuhkan tersebut tetapi dengan mengikut prinsip undang-undang secara am. Sehingga dan sesudah jawatankuasa kaedah memasukkan peruntukkan memberi hak kepada surat kuasa wakil membuat permohonan bagi pihaknya, pempetisyen mesti memulakan petisyen atas nama wasi. Pempetisyen oleh
D itu diberikan kebenaran untuk meminda petisyen tersebut, selaras dengan kuasa yang diberikan oleh mahkamah di bawah A 18 k 19 KMT (lihat ms 98G–I).

(2) Aturan 71 k 26 KMT mementingkan pengeluaran geran terhad kepada peguam sebagai pentadbir. Ia tidak relevan kepada
E pempetisyen untuk mementerai semula. Seperti yang dinyatakan dengan jelas di dalam s 52 Akta tersebut, apabila probet geran dimeterai semula dalam kes ini, wasi sepatutnya boleh mentadbirkan harta simati di Malaysia dengan menggunakan geran yang sama yang dikeluarkan kepadanya oleh Mahkamah Tinggi di United Kingdom. Mahkamah Tinggi di sini tidak perlu
F mengeluarkan geran kepadanya (lihat ms 98D–E).

(3) Pempetisyen boleh memperakukan afidavit yang mengesahkan bahawa petisyen bagi pihak wasi sebagai surat kuasa wakil adalah memadai untuk memberi kuasa kepada peguam untuk menandatangani afidavit bagi pihak wasi. Kenyataan-kenyataan
G dalam petisyen boleh ditentukan oleh dokumen-dokumen rasmi dan dengan ini tidak memerlukan kemahiran individu dan pengetahuan peguam (lihat ms 100E–F).]

Notes

H For cases on limited grant, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1978–1980.

For cases on resealing of grant, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1986–1988.

Cases referred to

I *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 4 CLJ 197 (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)
Clauss & Anor v Pir [1987] 2 All ER 752 (refd)
Jackson v John Litchfield & Sons (1881–1882) 8 QBD 474 (distd)
Sivarendran s/o V Markandoo & Anor v Dr Mahendran a/l V Markandoo [1988] 2 MLJ 169 (refd)
TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567 (refd)
Wallace, Re, ex p Wallace (1884) 14 QB D 22 (refd)

Legislation referred to

Courts of Judicature Act 1964
Non-Contentious Probate Rules 1987 [UK] r 39(1)
Practice Direction No 4 of 1981
Probate and Administration Act 1959 s 52
Probate and Administration Rules 1961 rr 6(1), (2), (3), 3(1), (2)
Rules of the High Court 1980 O 1 r 7, O 18 r 19, O 71 rr 5(1), (6), 26, O 72, O 92 r 4, O 93 r 1(b)
Small Estate (Distribution) Act 1955
Small Estates (Distribution) (Amendment) Act 1977
Small Estates (Distribution) (Amendment) Act 1982
Small Estates (Distribution) (Amendment) Act 1988
Small Estates (Distribution) (Amendment and Extension) Act 1972

Azhar Azizan Harun (*Azhar & Goh*) for the applicant.

Cur Adv Vult

Kamalanathan Ratnam J: This is a petition for resealing a grant of probate pursuant to s 52 of the Probate and Administration Act 1959 ('the Act'). Section 52 of the Acts reads as follows:

> Where a Court of Probate in any part of the Commonwealth has, either before or after the passing of this Act, granted probate or letters of administration in respect of the estate of a deceased person, the probate or letter of administration so granted, or a certified copy thereof, sealed with the seal of the Court granting the same, may, on being produced to and a copy thereof deposited in the High Court, be sealed with the seal of the High Court, and thereupon shall be of the like force and effect, and have the same operation in Malaysia, as if it were a grant made by the High Court:
>
> Provided that —
>
> (a) ...
>
> (b) ...

The two provisos are not applicable to the facts of this case.

This petition is filed in the name of 'Azhar Azizan Harun sebagai wakil mutlak Eleanor Dulcie Robinson'. His counsel relied on a power of attorney ('the PA') dated 16 January 1998 given by Eleanor Dulcie Robinson ('the executrix') to Azhar Azizan Harun ('the petitioner') and another person to enable the petitioner to file the petition.

A Paragraph 1 of the PA appoints the petitioner and allows him to 'apply to the High Court of Malaya or other proper court having jurisdiction in the premises for a resealing of the grant of probate of the estate of the deceased and to take all such steps as may be necessary to obtain such resealing or other lawful representation within Malaysia ... and execute all such deeds, affidavits, documents and cause papers (if any) that may legally be required B for such purposes'.

This petition came up for hearing before the learned deputy registrar ('the DR') on 23 July 1998. After hearing submissions, the DR was not convinced that the petition had been correctly filed. She gave an opportunity to the petitioner to amend the petition but the petitioner C requested that the petition be dismissed in order that he may appeal to the judge. Hence, this appeal.

The deputy registrar's grounds

The DR's view was that the petition ought to have been filed in the name of D 'Eleanor Dulcie Robinson' as the petitioner, and that the present petitioner could sign the petition on her behalf by virtue of the PA. Briefly, her reason for so doing was that there is no substantive provision in the Act or the Rules of the High Court 1980 ('the RHC') to allow for the filing of the petition in the manner that it was done. That being the case, Form 168 of the RHC has to be varied as stated by O 1 r 7 of the RHC which allows for variations as the E circumstances of the particular case require. The position in Malaysia is to be differentiated from the position in the United Kingdom since the repeal of the Probate and Administration Rules 1961 ('the 1961 Rules'), and also because of the non-existence of r 39(1) of the Non-Contentious Probate Rules 1987 ('the NCPR') of England, here in Malaysia. Rule 39(1) provides as follows:

F > An application under the Colonial Probates Act 1892 and 1927 for the resealing of probate or administration granted by the court of a country to which those Acts apply may be made by the person to whom the grant was made or by any person authorised in writing to apply on his behalf.'

Rule 6 of the 1961 Rules provides as follows:

G > (1) All petitions shall, in addition to all matters required by the form prescribed under these Rules, state the names and addresses (so far as known to the petitioner) of all persons having a prior or equal right to a grant, and on what ground the petitioner claims a grant in priority to each of such persons.
>
> H (2) *Where the petitioner applies as the attorney of any other person,* or for the use and benefit of an infant or person of unsound mind, or other person not qualified to obtain a grant to himself, the petition shall state with full particularity the source of the petitioner's authority, or the grounds on which he claims to be entitled to a grant for the use and benefit of such other person.
>
> I (3) Where the petitioner applies as the attorney of another person, he shall be required to prove that he has deposited his power of attorney or a copy thereof in the Registry of the Supreme Court in the manner provided by the Powers of Attorney Ordinance 1949. (Emphasis added.)

Paragraph 2 of Form 3 of the 1961 Rules states as follows: A

> That the petitioner claims to represent the said deceased on the ground that —
>
> (a) ... or
>
> (b) ... or B
>
> (c) She is the duly authorised attorney of the said ..., the *executor* of the said administrator deceased, duly appointed as aforesaid.

Strict compliance with O 71 of the RHC 1980

There are many provisions in the NCPR which had been incorporated into O 71 of the RHC. However, r 39 is not one of those rules included. Neither is the first part of the r 6(2) of the 1961 Rules included. Where no substantive power is provided under the RHC or the Act, then Form 168 cannot purport to confer such a power. C

Counsel for the petitioner has referred to the Supreme Court decision of *Sivarendran s/o V Markandoo & Anor v Dr Mahendran a/l V Markandoo* [1988] 2 MLJ 169 where the court emphasized that 'probate actions whether contentious or non-contentious, should comply with O 71 and O 72 of the RHC'. D

To my mind, it goes without saying that the decision of the Supreme Court must be complied with. That being the case, if such a power allowing someone else, authorized in writing, to apply on the executrix's behalf is excluded from the RHC, then to proceed under Form 168 as if such a power existed cannot be right. E

Practice Direction No 4 of 1981 states as follows:

> Your attention is drawn to O 71 of the Rules of the High Court 1980 and the forms thereto. It should be noted that the rules do not provide for notice of hearing of the petition as was to be found in rule 26 of the Probate and Administration Rules 1961 and Form 8 thereto. F
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> However it appears that some registries still continue to require that the notice of hearing of petition under the repealed rule 26 be filed in non-contentious probate proceedings. This practice is not correct. G
>
> 3 The Hon Chief Justice directs that it is not necessary for the notice of hearing to be filed. It is sufficient that the date of hearing is endorsed on the petition. If the date of hearing is changed, the new date may be notified by letter.

By the same token, the practice of filing of the petition in the name of the petitioner cannot be right as r 6 of the 1961 Rules has been repealed and r 39(1) of the NCPR was not incorporated into O 71 of the RHC. Counsel for the petitioner submitted that immediately prior to the coming into effect of the RHC, the practice in our courts relating to probate and administration was governed by the 1961 Rules. The 1961 Rules were repealed by O 93 r (1)(b) of the RHC and hence, ceased to be of effect as of 1 June 1980. Counsel for the petitioner further submitted that by r 3(1) and (2) of the 1961 Rules, an application for probate and letters of H I

A administration or resealing thereof may be made at the principal registry and all such applications shall be made by way of petition in form 1, 2 or 3 prescribed therein. He elaborated on the forms and stated that in cases where the petitioner applied as the attorney of another person, specific requirements were made in r 6(2) and (3) thereof. The form of petition for resealing was prescribed in Form No 3 in the 1961 Rules. This form B contained three versions of para 2 to cater for different circumstances, one of which includes a situation where the petitioner is an authorized attorney of the executor or administrator. Counsel therefore concluded that in view of the absence of any specific provision relating to an application for resealing in the RHC, as was provided for in the 1961 Rules, then the C procedure in our courts relating to the same should be as nearly like as they can be to analogous proceedings before the RHC and that would mean that an application of this nature could now be made by way of a petition and naming an attorney as the petitioner.

Reliance on repealed law cannot be upheld

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This is where the DR disagreed with the learned counsel. The DR was of the view that provisions of the repealed 1961 Rules if not incorporated in the RHC cannot continue to apply, and that the procedure in England cannot apply in Malaysia due to the absence of r 39 of the NCPR. The case of *Jackson v John Litchfield & Sons* (1881–1882) 8 QBD 474 can E easily be distinguished from the facts of this case. In that case, the common law principles were never excluded from the Judicature Acts but in this case, the previous right to petition on someone else's behalf had been excluded from the existing legislation. The petitioner relied on the case of *Jackson v John Litchfield & Sons* for this proposition of the law. In that case, a writ had been filed in accordance with the Judicature Orders F and Rules which were then in force. The Judicature Orders and Rules did not contain a specific provision for a judgment to be entered against individual partners. The Court of Appeal noted that prior to the Judicature Orders and Rules, the common law rule applied and at common law, there was no means of suing or of obtaining judgment G against a firm. Brett LJ held as follows (at p 477):

> I wish to state what I consider to be a canon or rule of construction for a guide in such a matter, ... that in all cases at common law, which are not provided for by the Judicature Acts, the proceedings are to be as they were before those Acts, and that in all cases within the Judicature Acts, where no special steps in proceedings are provided, the proceedings are to be as nearly like as they can H be to analogous proceedings before those Acts.

In *Ahmad bin Salleh & Ors v Rawang Hills Resort Sdn Bhd* [1995] 4 CLJ 197 at p 203, James Foong J had occasion to discuss the law relating to power of attorney. His Lordship referred to 2(1) *Halsbury's Laws of England* para 86 which states that the law applicable where a power of attorney is I created between a donor and the donee is that of principal and agent.

Atkin's Encyclopaedia of Court Forms in Civil Proceedings (2nd Ed) Vol 30 at p 32 states as follows:

> Attorney. A person suing under a power of attorney on behalf of his principal sues in the name of the principal only; the title to the action should not indicate the existence of the power of attorney.

In s 3 of the Courts of Judicature Act 1964, 'action' unless the context otherwise requires, means:

> a civil proceeding commenced by writ or in such other manner as is prescribed by rules of Court, but does not include a criminal proceeding;

As the resealing action was one that was commenced by petition as is prescribed by the RHC, the learned judge in *Ahmad bin Salleh* held that the title to the action should not indicate the existence of the power of attorney. I am inclined to agree with him. The 1961 Rules have been repealed but if there remains, in Form 168, a right to make such an application for resealing when the rule giving that right had been repealed, then Form 168 has to be varied in accordance with O 1 r 7 RHC.

Can Form 168 be varied?

At first glance, one might be misled into thinking that Form 168 may not be varied by reading O 71 r 5(1) of the RHC which provides as follows:

> Every application for a grant must be by petition in one of the forms in Form 168 and the petition must be verified by oath which must be contained in an affidavit sworn by the applicant, and supported by such other papers as the Registrar may require.

Any doubts arising as to whether Form 168 may be varied is dispelled by reading O 1 r 7 and O 71 r 5(6) of the RHC. Order 71 r 5(6) provides:

> Where an application for a grant is, for the first time, made after the lapse of 3 years from the death of the deceased, the reason for the delay in making the application must be set out in the petition.

If one looks at the intitulement to Form 168, it would also be insufficient. As counsel had rightly done in this case, he had varied the intitulement in Form 168 and has set it out in the correct manner as decided in the Court of Appeal in the case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457. I had in an earlier judgment of *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567 also followed the decision of the Court of Appeal. The material part of the decision of the Court of Appeal is at p 477 which reads as follows:

> ... an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and it may be liable to be struck out, unless sooner amended.

Therefore, it is no answer to state that one had followed Form 168 in the RHC 1980. The intitulement in Form 168 is as follows:

> In the Estate of ... deceased.

Nothing more is stated. If counsel had seen it fit to amend the intitulement to abide by the decision of the Court of Appeal, there is no reason why the body of the form should not be amended or varied to reflect the correct legal position.

An intestate estate not exceeding 'ten thousand dollars' in value would not be dealt with by the High Court.

The definition of a 'small estate' in 1972 was an estate not exceeding in value 'ten thousand dollars'.

I will deal more with the intitulement in the later part of my decision.

More importantly, if one looks at Form 168(b), para 2 states as follows:

> The whole of the estate and effects of the deceased, movable and immovable, within the jurisdiction exclusive of what the deceased was possessed of or entitled to as a trustee for any other person or persons, and not beneficially but without deducting anything on account of the debts due or owing from him, does exceed in value ten thousand dollars to the best of the Petitioner's knowledge, information and belief.

The value of 'ten thousand dollars' had been in Form 168(b) since the RHC came into force on 1 June 1980. The purpose of para 2 above is to state that the court has jurisdiction to hear the petition as the value of the estate does exceed in value 'ten thousand dollars'.

The Small Estate (Distribution) Act 1955 ('Act 98') defines a small estate to be an estate consisting wholly or partly of immovable property situated in any state and not exceeding ten thousand dollars in total value. With effect from 23 June 1972, the Small Estates (Distribution) (Amendment and Extension) Act 1972 ('Act 127'), the value of a small estate was ten thousand dollars until the Small Estates (Distribution) (Amendment) Act 1977 ('Act A399'). Act A399 increased the value of a small estate to not exceeding twenty five thousand ringgit with effect from 10 June 1977. By an amendment to Act 98 in 1982, the value of a small estate was again increased from not exceeding twenty five thousand ringgit to not exceeding fifty thousand ringgit. The Small Estates (Distribution) (Amendment) Act 1982 ('Act A533') was made with retrospective effect and came into force from 18 October 1979. The last amendment to Act 98 affecting the value of a small estate came into force from 1 January 1989. As of that date, a small estate was one that was defined as having a value of not exceeding six hundred thousand ringgit. The Small Estates (Distribution) (Amendment) Act 1988 ('Act A702') was the last amendment. As at 1 June 1980, para 2 of Form 168(b) of the RHC should have stated the value to be in excess of twenty five thousand ringgit as the value of a small estate then was one not exceeding twenty five thousand ringgit in total value. Each time the law is amended, the forms affected by such amendments would accordingly have to be read as having been amended in like manner. Therefore, it is quite clear that the collector has the jurisdiction to order distribution of a small estate.

Based on the above, I would hold that Form 168 is to be varied accordingly and that the answer that one had followed Form 168 is not the be all and end all of it all.

Apllication for a limited grant by an attorney

I had earlier stated that I will deal further with the intitulement as set out by the petitioner and this is what I have to say. The intitulement of the petitioner also refers to O 71 r 26 of the RHC. O 71 r 26 provides as follows:

> Where a person entitled to a grant resides outside Malaysia, administration may be granted to his lawfully constituted attorney for his use and benefit, limited until such person shall obtain a grant or in such other way as the Registrar may direct:
>
> Provided that the attorney must file a certified true copy of the power of attorney with the petition or prove that he has deposited it or a certified copy of it in the Registry of the High Court in the manner provided by section [4] of the Powers of Attorney Ordinance 1949;
>
> And provided that where the person so entitled is an executor, administration shall not be granted to his attorney without notice to the other executors, if any, unless such notice is dispensed with by the Registrar.

It is to be noted that r 26 is concerned with the issuance of a limited grant to the attorney as an administrator. It is not relevant to a petition for resealing. As clearly stated in s 52 of the Act, when the grant of probate is resealed in this case, the executrix would be able to administer the estate of the deceased in Malaysia by using the same grant that was issued to her by the High Court in the United Kingdom. The High Court here does not need to issue her with a grant. However, if the application was for a limited grant for the petitioner to administer the estate in Malaysia under O 71 r 26, the High Court here would have to issue out the limited grant of letters of administration to the petitioner in the petitioner's name, in which case the petitioner would have rightly commenced the petition in his own name. A reading of chapter 11 on limited grants in *Tristram & Cootes, Probate Practice* (28th Ed) will provide much assistance for one to see the difference between an application for resealing and an application under O 71 r 26 of the RHC.

Exercise of inherent powers of the court

Counsel has strongly urged me to exercise the court's powers under O 92 r 4 of the RHC to prevent injustice. In actual fact, this is what the DR had done. As the rules of procedure were silent, she tried to give effect to the provisions of s 52 of the Act by not relying on the repealed 1961 Rules but by following general legal principles. I am of the view that her reasoning is correct. Until and unless the rules committee reinstates the provision giving the right to the power of attorney to make the application on his behalf, I hold that the petitioner must commence the petition in the executrix's name. I would therefore allow the petitioner to amend the petition, as under O 18 r 19 of the RHC, the court may at any stage of the proceedings order to be amended any pleading and the court may stay the action until the amendment is made.

Whether the petitioner may affirm the affidavit as an attorney?

The attorney may affirm the affidavit verifying the petition only if the power of attorney was wide enough to enable him to do so and where no personal knowledge is required.

In *Re Wallace, ex p Wallace* (1884) 14 QBD 22, a bankruptcy petition was presented by W Richards of Prince Edward's Island, and signed 'William Richards by his attorney Thomas Picton Richards'. The signature was attested by a witness, and the attestation clause was as follows: 'signed by the petitioner by his attorney, Thomas Picton Richards, in my presence'. The power of attorney empowered TP Richards, on behalf of his principal, 'to commence and carry on, or to defend, at law or in equity, all actions, suits or other proceedings, touching anything in which I, or my ships, or other personal estate, may be in anywise concerned'. The debtor appealed from the receiving order made against him on the ground that the creditor's petition was signed on his behalf by his attorney. The Court of Appeal held that a petition in bankruptcy might be signed on behalf of the petitioning creditor when the terms of the power of attorney so allowed, and that the terms of the said power of attorney were wide enough to authorize the attorney to sign a creditor's petition on behalf of his principal.

In *Clauss & Anor v Pir* [1987] 2 All ER 752, the plaintiffs and the defendant both claimed to be entitled to the grant of letters of administration in respect of the estate of the deceased who had died intestate. The plaintiffs claimed on the basis that they were the next of kin, while the defendant claimed to be the deceased's adopted son. The plaintiffs commenced a probate action for the grant of letters of administration and in the course of that action, the master ordered that the relevant documents, verified by affidavit, be served by 26 June 1986. Both duly served the documents by the appointed date, but the defendant's affidavit was sworn by his wife on whom he had conferred a statutory power of attorney. The judge in his decision at p 755 stated as follows:

> What a principal can lawfully do by an attorney is summarized in *Halbury's Laws* (4th Ed) para 703 as follows:
>
> > 'It may be stated as a general proposition that whatever a person has power to do himself he may do so by means of an agent. The converse proposition similarly holds good that what a person cannot do himself he cannot do by means of an agent. It is, in general, necessary to ascertain who is legally competent to act or contract in order to know who is competent to be a principal. There are, however, two exceptions to the general rule that a person may do by means of an agent whatever he has power to do himself, and there are ... .'
>
> And then there is an exception where statute requires the evidence of a signature of the principal. The second exception is:
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> > 'where the competency to do the act arises by virtue of the holding of some public office or by virtue of some power, authority, or duty of a personal nature and requiring skill or discretion for its exercise ... .'
>
> and then the paragraph goes on with an example which is not material.

A

> It appears from that passage that a party cannot do by an attorney some act the competency to do which arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise.
>
> ... the obligation to swear a verifying affidavit which requires the deposing party to apply his mind to matters which are or should be within his own knowledge (and, amongst other things, to make the very important statement on oath that there are not and have not been in his possession, custody or power any documents relevant to the action apart from those which are disclosed) is a clear example of a duty of personal nature requiring skill or discretion for its exercise'.

B

On p 756, the learned judge held:

C

> ... that is a personal duty which he alone can perform because of the personal knowledge which is required. After all, he is being compelled to give a particular form of evidence and in no other field would it be possible to say that a party may give evidence through an attorney. If the obligation under O 24 r 3(3) must be performed personally, there is nothing in the 1971 Act (Powers of Attorney Act 1971) to change that. The order which was made by Master Munrow in this case on 29 July 1986 required *the defendant* to serve a list of documents verified by affidavit. The requirement that he should serve his list verified by affidavit ... is not something which can be delegated. It required the defendant to do something personally which cannot be done by means of an attorney.

D

E

The learned judge therefore extended the time for filing the affidavit verifying the documents and ordered the principal to affirm the affidavit personally.

Having perused the power of attorney and the statements in the petition in this case, I would hold that the petitioner may affirm the affidavit verifying the petition on behalf of the executrix, as the power of attorney is wide enough to authorize the attorney to sign the affidavit on the executrix's behalf and the statements in the petition may be verified by official documents and therefore do not require the personal skill and knowledge of the attorney.

F

I therefore set aside the order of the DR and order that an amended petition be filed within 14 days from the date of this decision failing which the petition do stand dismissed with costs. The amended petition shall be fixed and heard by the DR as is the usual practice. The costs of this appeal shall be taxed and be paid out of the estate of the deceased.

G

Order of the deputy registrar set aside.

H

Reported by Mohd Rizal Abidin

I